

OCT 20 1975

MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1975

**75-1490**

MAX ZIVIAK, individually  
and as Administrator of the  
Estate of Herbert Ziviak, on  
behalf of himself and all  
others similarly situated,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellees.

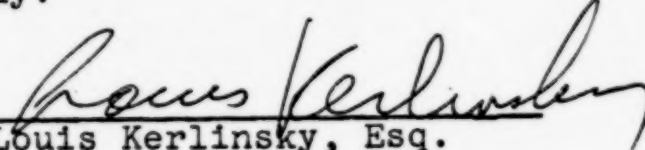
On Appeal from a Three Judge Court of the  
United States District Court for the  
District of Massachusetts

PLAINTIFF'S PETITION FOR REHEARING

Louis Kerlinsky, Esq.  
31 Elm Street  
Springfield, Mass. 01103  
732-3173

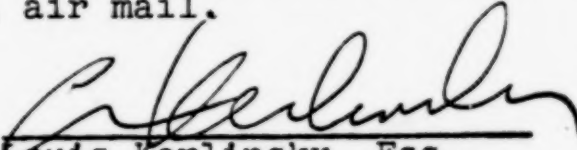
Attorney for Appellants

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

  
Louis Kerlinsky, Esq.

#### CERTIFICATE OF SERVICE

I, Louis Kerlinsky, Attorney for the Appellants, certify that on October 18, 1976, I served (2) copies of this Plaintiff's Petition For Rehearing upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same, postage prepaid, air mail.

  
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Plaintiff respectfully prays for a rehearing in this case where the Court has affirmed the decision of a three-Judge panel upholding the constitutionality of Section 3203(b) of Title 38 of U.S. Code. The Veteran's Administration's interpretation of this statute discriminates against institutionalized veterans and their parents. The Court below found that this case is maintainable as a class action on behalf of all similarly situated parents of incompetent veterans. Contrary to the defendant's Motion to Affirm in this case, the Court below held that "Congress chose to differentiate between survivors of mentally competent and mentally incompetent veterans, barring payment of the lump sum that had been accumulated to the survivors of an incompetent veteran who had died still rated incompetent." JS. page 21. The opinion in the Court below is in conflict with the case of Berkey vs. United States, 361 F2d 983 (Ct. Cl. 1966). While the Court in Berkey did not express an opinion as to the payment of so-called gratuitous benefits, the reasoning of the Berkey case clearly applies to them. The Court below held that there was no unconstitutional discrimination because "Congress was aware of the disparity in length of hospitalization between incompetent and competent veterans." See JS page 30. There was no proof that any such disparity existed. The case was decided on a Motion for Summary Judgment. The record does not show that if there was any such disparity that that was the basis of the Congress' discriminatory treatment. Nor does it show that the Veterans Administration's interpretation of this statute is correct. The de-

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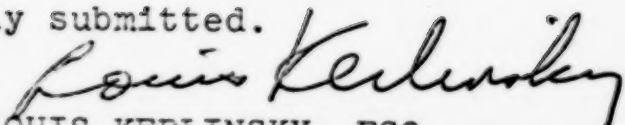
endant in its motion to affirm does not rely on any such basis and makes no mention of the rationale of the Court below in its motion to affirm. If the period of hospitalization is the rationale for the discriminatory treatment then the statute is clearly irrational and arbitrary. If Congress intended to limit the benefits of persons if the duration of their hospitalization, exceeding a certain period of time, the statute should so state and any statute which attempts to reach the same result by an inference that incompetent veterans are hospitalized longer than competent veterans is clearly arbitrary and unreasonable. By affirming the decision of the Court below, the U.S.S. Court is affirming the reasoning of the Court below to the effect that Congress had a rational justification in discriminating against incompetent veterans alone where it intended to discriminate against persons who were hospitalized for certain periods of time. The categorization is too broad, as some of the incompetent veterans in this class action may well have been hospitalized for a relatively short period of time. To affirm the granting of summary judgment in favor of the defendant in this case without a hearing and without the filing of briefs deprives parents of incompetent veterans sums due to the veterans for service-connected disabilities simply because of their disability was of a mental nature rather than of a physical nature. The only purpose of the Act that appears from the Congressional Record is that Congress wished to save money. There is no reason set forth in the legislative history for discriminating against parents of incompetent vet-

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erans. Such discrimination is irrational, arbitrary and invalid.

It is respectfully submitted that the Plaintiff is entitled as a matter of law to an appeal to the United States Supreme Court. This appeal involves and entails the right to file a brief on the issues involved in the case so that the Court may consider the Plaintiff's position on a brief if not an oral hearing. It is respectfully submitted that the Plaintiff has been deprived of his right to set forth his position on appeal to the United States Supreme Court. Plaintiff did not understand or contemplate that his entire brief or the substance of his brief should be included in his Jurisdictional Statement or in any brief in opposition to the Defendant's Motion to Affirm. It was the understanding of the Plaintiff's Attorney that the purpose of the Jurisdictional Statement was to show that the Court had jurisdiction over the case. As the case involved substantial sums of money and involved a constitutional issue, it would appear that the reasons for the Plaintiff wanting to file a brief were apparent and adequately appeared from the Jurisdictional Statement. Plaintiff feels that he has an inherent right to file a brief to the United States Supreme Court on the issues involved in this appeal and that the disposition of his case by the United States Supreme Court without giving the plaintiff an opportunity to file a brief deprives the plaintiff of his right to be heard and to his right to a meaningful appeal.

Respectfully submitted.

A handwritten signature in cursive script, reading "Louis Kerlinsky". The signature is written in dark ink and is positioned above the typed name.

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